Supreme Court, U.S.

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No. 00-

IN THE

Supreme Court of the United States

J. B. PINER, JUDY BROWN, STEPHEN C. BYRD, WILLIAM CLEMMONS, THOMAS E. GRADY, NORMAN HORNE, STEVENS McLEAN, JEFFERY L. STEALER, C. D. STOKES, JAMES H. WEBB, and LARRY WHITLEY, on behalf of themselves and all others similarly situated,

Petitioners,

v.

E. I. DuPONT de NEMOURS AND COMPANY; THE BOARD OF BENEFITS AND PENSIONS OF E. I. DuPONT de NEMOURS AND COMPANY; and THE DuPONT PENSION AND RETIREMENT PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not the decision of the United States Court of Appeals for the Fourth Circuit concerning the failure of the United States District Court to provide the Petitioners with notice and a reasonable opportunity to conduct discovery prior to converting the Respondent's Rule 12(b)(6) motion to Rule 56 conflicts with prior decisions of the Fourth Circuit and with decisions of another United States Court of Appeals.

Whether or not Petitioners have standing to sue under ERISA.

Whether or not Petitioners can maintain their claims for breach of fiduciary duty under ERISA Section 502(a)(3).

Whether or not Petitioners have stated a claim for the recovery of statutory penalties under ERISA.

PARTIES TO THE PROCEEDING

The Petitioners are eleven employees or former employees at the Cape Fear facility of E.I. DuPont de Nemours and Company (DuPont) in Leland, North Carolina, who are, or were, participants or beneficiaries in the DuPont Pension and Retirement Plan.

The Respondents are Petitioners' employer, DuPont, which is the Plan Sponsor and Administrator of the DuPont Pension and Retirement Plan, and the DuPont Board of Benefits and Pensions, which Board interprets and applies the provisions of the DuPont Pension and Retirement Plan, and the DuPont Pension and Retirement Plan.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit opinion (App. A) is an unpublished per curiam opinion. The opinion of the United States District Court for the Eastern District of North Carolina (App. B) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 14, 2000. The United States Court of Appeals for the Fourth Circuit entered an orde: denying a timely petition for rehearing and petition for rehearing en banc on December 12, 2000 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*

STATEMENT OF THE CASE

The Petitioners, employees and former employees at the Cape Fear facility of E.I. DuPont de Nemours and Company ("DuPont"), filed this putative class action on March 31, 1999, on behalf of all employees and former employees at the Cape Fear facility of DuPont who are, or ever were, participants or beneficiaries in the DuPont Pension and Retirement Plan. The eleven named Petitioners are employees or former employees of DuPont who bring this class action on behalf of themselves and all others similarly situated.[1] The claims asserted are for the breach of the responsibilities, obligations, and duties imposed on fiduciaries and non-fiduciaries by the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001, *et seq.*, including, but not limited to, the different treatment of similarly-situated participants and beneficiaries under the DuPont Pension and Retirement Plan. The Respondents are Petitioners' employer, DuPont, which is the Plan Sponsor and Administrator of the DuPont Pension and Retirement Plan, and the DuPont Board of Benefits and Pensions, which Board interprets and applies the provisions of the DuPont Pension and Retirement Plan, and the DuPont Pension and Retirement Plan.

On August 31, 1999, the Respondents served their Motion to Dismiss, or in the Alternative for Summary

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1. Two hundred and sixty-four (264) other employees and former employees of DuPont at the Cape Fear facility have joined these named plaintiffs in this action and are represented by Plaintiffs' counsel in this case. These putative class members include DuPont employees who had more seniority than Joe Floyd and Sam Franklin, volunteered for the 1992 VSP but were not selected, and who participated in the DuPont Pension and Retirement Plan.

Judgment, With Memorandum. On October 11, 1999, the Petitioners served the Plaintiffs Response and Memorandum in Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. On October 28, 1999, the Respondents served the Defendants' Reply in Support of their Motion to Dismiss. The parties briefed the issues under Rule 12(b)(6), F.R.C.P., and summary judgment was not briefed. No hearing was held by the District Court, although the parties were discussing possible dates for a hearing when the District Court granted summary judgment against the Petitioners. On November 29, 1999, a Judgment, with accompanying Order allowing the Defendants' Motion for Summary Judgment, was entered by the District Court.

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court on November 14, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition rehearing en banc on December 12, 2000.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE FOURTH CIRCUIT AND WITH DECISIONS OF ANOTHER UNITED STATES COURT OF APPEALS.

The decision of the United States Court of Appeals for the Fourth Circuit conflicts with prior decisions of the Fourth Circuit and with decisions of another United States Court of Appeals. This conflict alone provides a compelling reason to grant this petition.

The Fourth Circuit Court of Appeals previously has held that a district court choosing to treat a motion to dismiss as one for summary judgment errs if it fails to provide the parties with notice and a reasonable opportunity to present their positions under Rule 56.

Finley Lines Jt. Protect. Bod. v. Norfolk So. Corp., 109 F.3d 993, 996 (4th Cir. 1997); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995), *vacated on other grounds*, __ U.S. __, 116 S. Ct. 1821, 134 L. Ed. 2d 927 (1996); *Gay v. Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976); *Johnson v. RAC Corp.*, 491 F.2d 510, 513 (4th Cir. 1974).

In *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985), in reversing the grant of summary judgment, Circuit Judge Ervin stated,

> Under Rule 12(b) of the Federal Rules of Civil Procedure, when matters outside the pleadings are submitted with a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), "the motion shall be treated as one for summary judgment and parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." In interpreting the requirements of this rule, this court has held that the term "reasonable opportunity" requires that all parties be given "some indication by the court . . . that it is treating the 12(b)(6) motion as a motion for summary judgment, with the consequent right in the opposing party to file counter affidavits or pursue reasonable discovery." *Johnson v. RAC*

> *Corporation*, 491 F.2d 510, 513 (4th Cir. 1974)) (quoting *Dale v. Hahn*, 440 F.2d 633, 638 (2nd Cir. 1971)). See also C. Wright and Miller, 5 *Federal Practice and Procedure Section* 1366 (1969) . . . However, notification that a Rule 12(b)(6) motion may be converted is only one of the requirements of Rule 12. *Once notified, a party must be afforded a 'reasonable opportunity for discovery' before a Rule 12(b)(6) motion may be converted and summary judgment granted. Johnson v. RAC Corporation*, 491 F.2d at 515. Such an opportunity was not provided in the case at bar.

Id. at 177 (emphasis added).

In *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976), this Circuit Court of Appeals, in a *per curiam* opinion, vacated the judgment of the district court and remanded the case in order that the parties be given a reasonable opportunity to file counter affidavits or to pursue reasonable discovery. The Fourth Circuit Court of Appeals found no indication in the record that, prior to dismissing the case, the district court had given the requisite notice to all parties that it was treating the 12(b)(6) motion as a motion for summary judgment as provided by the Federal Rules of Civil Procedure. *Id.* at 1235.

In *Johnson v. RAC Corporation*, 491 F.2d 510, 513 (4th Cir. 1974), this Circuit Court of Appeals, in reversing the district court, found that the district court did not indicate to the parties that it was treating the 12(b)(6) motion as a motion for summary judgment nor did it provide by appropriate order "reasonable opportunity" for the plaintiff

to employ discovery. *Johnson*, *supra*, at 514. In so finding, Circuit Judge Russell said,

> The Plaintiff should have been afforded an opportunity, as the procedure followed in *Barnes* suggests, to employ discovery, in order to counter, if he could, the facts set forth in the Defendant's affidavit or to establish a factual basis for his action against the Defendant; *and this is especially so since the facts on which the Defendant predicates its motion in this respect lie peculiarly within the knowledge of the defendant.*

Id. at 514 (emphasis added).

In *Finley Lines Jt. Protect. Bd. v. Norfolk So. Corp.*, 109 F.3d 993, 996 (4th Cir. 1997), in reversing the district court, this Circuit Court of Appeals stated,

> Norfolk's suggestion also conflicts with Rule 12(b)(6)'s requirement that a court provide parties with notice of its intention to treat a motion to dismiss as one for summary judgment and "a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P.12(b)(6); see also *Anheuser-Bush v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995); *Johnson v. RAC Corp.*, 491 F2d 510, 513-14 (4th Cir. 1974); *Gay v. Wall*, 761 F.2d 175, 177-178 (4th Cir. 1985).

The Petitioners contend here, as they did below, that they should be allowed to proceed to discovery. As the *Johnson* court observed, "this is especially so since the facts

on which the Defendant predicates its motion in this respect lie peculiarly within the knowledge of the defendant." *Johnson*, *supra*, at 514.[2]

The District Court erred in converting Defendants' Rule 12(b)(6) Motion to a Rule 56 Motion and by failing to provide the Plaintiffs with notice and a reasonable opportunity to conduct discovery.

The Court of Appeals affirmed the judgment of the United States District Court which judgment conflicts with previous opinions of the Fourth Circuit and other United States Courts of Appeals.

The decision of the Court of Appeals cannot be squared with its own decisions and those of other United States Court of Appeals on this same question. For this reason alone, the writ should be granted.

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2. United States District Court Judge Fox, in *Kimberly Page, et al. v. William W. Riddle, Jr., et al.*, 7:98-CV-141-F(1), stated,

> Inherent in the very nature of plaintiffs' claims (ERISA) is an initial dearth of detailed factual support for the allegations because, inherent in the structure of the employee welfare benefit schemes is the removal of the employee/beneficiary from control and plan administration. *Unless they are permitted some measure of discovery from those charged with plan operation and administration, plaintiffs cannot supply the details* which the defendants argue are lacking.

Order, filed January 26, 1999, p. 8 (unpublished opinion) (Emphasis added).

II.

THE QUESTIONS PRESENTED UNDER ERISA ARE IMPORTANT.

In enacting the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, Congress sought to protect the interests of participants in employee benefit plans and their beneficiaries by creating individual statutory rights and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.

The questions of Congressional intent of the language "solely in the interest of the participants and beneficiaries" under 29 U.S.C. § 1104(a)(1), of standing to sue under Section 404(a)(1)(D) of ERISA, of the applicability of ERISA § 502(a)(3), and of the recovery of statutory penalties under Section 104(b)(4) of ERISA are important questions in the development of decisional law under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

A. Petitioners Have Standing To Sue under ERISA.

The Court of Appeals agreed with the judgment of the United States District Court that no evidence existed that VSP Prime was funded by the P&RP Trust and concluded that the availability of VSP Prime was not discrimination.

The Petitioners and the members of the putative class are all participants in the DuPont Pension and Retirement Plan. As such, they have standing under ERISA to assert claims for breaches of fiduciary duty arising out of the administration of the DuPont Pension and Retirement Plan. The Respondents granted preferential treatment to some Pension Plan participants through VSP Prime, which was

not a separate benefit but integrated with the P&RP. In doing so, and in funding VSP Prime in part with Pension Plan monies[3], the Petitioners contend that the Respondents did not discharge their duties with respect to the DuPont Pension and Retirement Plan solely in the interest of Pension Plan participants and beneficiaries.

Under ERISA, Congress imposed a duty upon plan fiduciaries to administer retirement plans for the "sole and exclusive benefit of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1); *See* H. Rep. No. 93-533, 93 Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News, 4639, 4649. ERISA requires that the fiduciaries of the DuPont Pension and Retirement Plan must discharge their duties with respect to that Plan "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1); § 404(a)(1), ERISA. This the Respondents have not done.

In *Winpisinger v. Aurora Corp. of Illinois, Precision Casting Div.*, 456 F. Supp. 559, 566, 569 (N.D. Ohio 1978), the United States District Court for the Northern District of Ohio held that pension plan fiduciaries breached their fiduciary duties under 29 U.S.C. § 1104(a)(1) with respect to the pension plan where they did not exercise their duties in a uniform and nondiscriminatory manner but, instead,

3. The Respondents' Exhibit 3 attached to the Affidavit of Shelby Harper indicates that excess pension assets were used to fund retiree health liabilities. Exhibit 2 to the Affidavit of Anne M. Cole indicates that VSP Prime recipients meeting certain age and service requirements received such ancillary health benefits funded by the Pension Trust. The VSP Prime recipients received full health benefits (unreduced due to early retirement) paid for by the Pension Trust, despite the fact that they were not otherwise eligible to receive such benefits. VSP Prime participants received an enhancement to benefits paid from the P&RP Trust.

granted preferential treatment to certain plan participants over other participants.

In *Williams v. Williamson-Dickie Mfg. Co.*, 778 F. Supp. 1197 (S.D. Ala. 1991), the United States District Court for the Southern District of Alabama, in denying the employer's motion for summary judgment, said, "The fiduciary standards of ERISA must be enforced with uncompromising rigidity, and fiduciaries should exercise their discretion to serve the interests of **all** participants in the plan." 778 F. Supp. at 1198-1199 (Emphasis added).

The Court of Appeals overlooked the material fact that the evidence conflicted as to whether VSP Prime was funded by the P&RP Trust. Through VSP Prime, DuPont granted preferential treatment to some Pension Plan participants with the use of funds from the DuPont Pension and Retirement Plan. In so doing, the Respondents failed to discharge their duties "solely in the interest of the participants and beneficiaries" of the DuPont Pension and Retirement Plan. As participants in the DuPont Pension and Retirement Plan, the Petitioners have standing to sue under ERISA.[4]

B. Petitioners Can Maintain Their Claims for Breach of Fiduciary Duty under ERISA § 502(a)(3).

The Court of Appeals did not address the applicability of ERISA § 502(a)(3) in its opinion. The Petitioners have

4. It should be noted that several United States Circuit Courts of Appeals have recognized that employees or former employees have standing to bring fiduciary claims where "but for the employer's conduct alleged to be in violation of ERISA, the employee or former employee would be a plan participant." *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *aff'd*, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996) (adopted without discussion).

stated a claim under 29 U.S.C. § 1132(a)(3), § 502(a)(3) of ERISA. Section 502(a)(3), ERISA, provides a cause of action by a participant, beneficiary or fiduciary to enjoin any act or practice which violates a provision of Title 1 of ERISA, or of the terms of the plan, or to obtain any other appropriate equitable relief to redress such violation. *See Varity Corp. v. Howe*, 516 U.S. 489, 512, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996) (individualized equitable relief available for breach of fiduciary obligations, at least "for injuries caused by violations that Section 502 does not elsewhere adequately remedy"). The Petitioners are provided a remedy under § 502(a)(3) of ERISA which authorizes the Court to grant to them appropriate equitable relief. The Petitioners have stated a claim under 29 U.S.C. § 1132(a)(3).

C. Petitioners Have Stated a Claim for the Recovery of Statutory Penalties.

The Court of Appeals agreed with the judgment of the United States District Court that the claim for statutory penalties failed because the Petitioners lacked standing to demand documents related to VSP Prime and because the circumstances did not warrant the imposition of statutory penalties with regard to P&RP documents.

The opinion of the Court of Appeals overlooked the material fact that Mr. Piner unequivocably stated in his Affidavit that he made a clear handwritten request for the plan document for the P&RP. Further, Mr. Piner in his Affidavit stated that, "Over a period of approximately three (3) years, I asked Shelby Harper for this information at least one hundred times."

The Petitioners have stated a claim for the recovery of statutory penalties under ERISA, 29 U.S.C. § 1024(b)(4) and § 1132(c). The circumstances here were similar to those in *Brooks v. Metrica, Inc.*, 1 F. Supp. 2d 559 (E.D. Va. 1998).

In *Brooks v. Metrica, Inc.*, 1 F. Supp. 2d 559 (E.D. Va. 1998), the United States District Court for the Eastern District of Virginia entered summary judgment for, and awarded statutory penalties, consequential damages, and attorneys fees to, the plaintiff where the employer breached its fiduciary duty to the plaintiff and failed to provide requested plan documents and information. In *Brooks*, *supra*, United States District Judge Ellis held that the employer was liable for statutory penalties where the employer displayed a cavalier attitude in not responding to oral and written requests of the employee and the employee's attorney.

For the reasons cited in Section A of this Argument II., the Petitioners have standing to bring an ERISA penalty claim based upon DuPont's refusal to share plan documents and information with them.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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